

No Place for Popular Sovereignty?

Democracy, Rights, and Punishment in *Gelman v. Uruguay*

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On 24 February 2001, the Inter-American Court of Human Rights issued its decision in *Gelman v. Uruguay*, condemning Uruguay for the forced disappearance of María Claudia García Iruretagoyena de Gelman and the birth in captivity of her daughter Macarena Gelman during the military dictatorship.² In the decision, the Court sentenced Uruguay to remove all obstacles that enabled those responsible for the crime to go unpunished. Accordingly, it considered that Law 15848 on the Expiry of Punitive Claims of the State (“Expiry Law”), passed on December 22, 1986, which prevented the criminal prosecution of people who had committed serious human rights violations during the military dictatorship, lacked any legal effect because of its incompatibility with the American Convention on Human Rights and the Inter-American Convention on Forced Disappearance of Persons. It also maintained that the law’s having been passed democratically and subsequently reaffirmed *two times* by popular referendums did not constitute grounds for impeding the Court from nullifying it.

The political and legal implications of this decision are enormous, and it addresses fundamental issues in contemporary constitutional theory. With regards my personal

¹ I especially wish to thank Gianella Bardanazo, Alicia Lissidini, Carol Machado Cyrilla da Silva, and Martín Soto Florián for their immense help in understanding better the cases concerning Uruguay, Brazil, and Peru. I also thank Gustavo Beade, Alejandro Chethman, Carlos Espósito, and Leonardo Filippini for their collaboration in discussion of some of the theoretical problems that I take up in this piece.

² Inter-American Court of Human Rights, *Gelman v. Uruguay*.

interest in the case, my analysis of the Inter-American Court of Human Rights (heretofore IACtHR) is not so much motivated by any intention to defend or criticize the decision as it is driven by the importance of the theoretical questions that the decision forces us to explore. The number of matters that it raises, and even the number of themes that merit special study, is understandably very large, so much so that giving each the attention warranted is beyond the scope of this paper. I will focus instead on a series of questions that the decision takes up, a series involving basic questions such as the following: How should the relationship between democracy and rights be conceived? More specifically, how should this relationship be conceived when it imbricates, as this case does, fundamental human rights and free, open plebiscites? How can the potential tension between the decisions of a democratic community and those adopted by international organizations be resolved? When the most serious violations of human rights are involved, to what extent should the state be allowed to determine the level or term of its reproach and what should be the limits on its discretionary power?

These questions raise three issues that are of great interest to me, topics upon which the subsequent analysis will focus: i) that of *democracy*; ii) that of *rights*; and iii) that of *punishment*. All three of the questions posed above relate to three problems that the *Gelman* decision ultimately raises.

The first problem, which I will refer to as (i) the problem of *democratic pedigree*, forces us to think more seriously about how we deal with distinct types of collective and democratic manifestations. What guides me in this sense is a feeling that different types of democratically-made decisions (a legislative act, a presidential decree, or a popular referendum) may require differentiated, rather than identical, treatments.

The second problem is related to rights, and the simple term I will use to identify it is (ii) the *problem of disagreement*. This problem involves the understandable differences of opinion that we encounter in every democratic society, not only in terms of which rights deserve protection, but also, and here I am particularly interested, disagreement over the meaning, content, and scope of the rights that we offer protection and, by extension, the question of what means should be employed to protect them. My overall intuition in this respect is that the deep and sensible disagreements about rights and their protection require a more dialogical (and therefore less authoritarian) approach to the question, especially when attempting to resolve ‘hard cases.’

The third problem, associated with the issue of punishment, involves (iii) *diverse forms of state reproach*. Here what I basically intuit is that reproach is not identical to punishment and that a democratic State must be able to choose among several distinct ways of reproaching that behavior that it seeks to discourage and simultaneously – assuming my assumption is accepted – that among the available types of reproach available to the State, punishment may or may not be included.

As we will see, the decision of the IACtHR in *Gelman* took up, more or less directly, the three problems just described (the problem of *democratic pedigree*, the problem of *disagreement* over rights, and the problem of *diverse forms of reproach*) and moreover that it did so on all three occasions in a way that appears to conflict with the three intuitions that I have just sketched out.

What follows as a way to more deeply analyze the questions thus arranged is an examination in three separate sections of the three themes cited (democracy, rights, and

punishment) through the lens of the *Gelman* decision alongside the three principal problems already identified. Towards the end of the paper, and on the basis of the argument developed in the text, I will attempt to articulate a new position, one that might better accommodate my intuitions regarding democracy, rights, and punishment.

I. Democracy and the Problem of Democratic Pedigree

The question of democracy turns out to be central, as we will see, in the context of the *Gelman* case. The judges of the IACtHR devote some of the most important argumentation to the matter. In paragraph 238 of its decision, accordingly, the Court sustains that:

The fact that the Expiry Law of the State was approved in a democratic regime and further ratified or supported by the citizenry on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. The participation of the public in relation with the law, ..., should be considered, as an act attributable to the State that give rise to its international responsibility.

Immediately afterwards, in paragraph 239, the Court elaborated and clarified its position on the matter by affirming that:

The bare existence of a democratic regime does not guarantee, *per se*, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter. The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention.

The Court thus, without hesitation and in no uncertain terms, denied the validity of the Expiry Law.³ Then the tribunal immediately – in the very same paragraph – went on to

³ The Law established the expiration of the “exercise of the punitive power of the State with regards crimes committed before 1 March 1985 by military and police officers for political motives or in instances of compliance with their duties and on the occasion of actions ordered by the acting commanders during the *de facto* period.”

further deny the relevance of the two direct popular consultations carried out by the Uruguayan government: the first of which was conducted in April 1989 by referendum (as mandated in paragraph 2 of Article 79 of the Uruguayan Constitution); and then again on 25 October 2009 through a general plebiscite (as described in subparagraph A of Article 331 of the Uruguayan Constitution), which put to popular vote a projected constitutional reform that would have nullified Articles 1 – 4 of the Expiry Law.

One of the first questions that the Court’s decision provokes is connected to the location in which the tension is reported between the democratic decisions for the amnesty on one side and international human rights law on the other. To ask more specifically, which aspect of international human rights law was being challenged by the democratic decisions taken in Uruguay? The Court anticipated the question, and addressed it in section F of its decision, referred to as “Amnesty Laws and the Jurisprudence of this Court.” In it, the Court once again insisted that “amnesty laws are, in cases of serious violations of human rights, expressly incompatible with the letter and spirit of the Pact of San José [of Costa Rica].” This idea had already been expressed by the Court, albeit slightly differently, in cases such as *Barrios Altos v. Peru* (2001), and was related to what had also been said in *La Cantuta v. Peru* (2006), *Almonacid Arellano v. Chile* (2006), and *Gomes Lund v. Brazil* (2010).⁴

This being so, the Court added (in paragraph 226 of *Gelman*) that amnesty laws:

[I]mpede the investigation and punishment of those responsible for serious human rights violations and, consequently, impede access to victims and their families to the truth of what happened and to the corresponding reparation, thereby hindering the full, timely, and effective rule of justice in the relevant cases. This, in turn, favors impunity and arbitrariness and also seriously affects the rule of law, reason

⁴ Inter-Am Ct of HR: *Barrios Altos v. Peru*, Series C No. 75 (14 March 2001); *La Cantuta v. Peru*, Series C, No. 162 (29 November 2006); *Almonacid et al v. Chile*, Preliminary Objections. Merits, Reparations, and Costs. Series C No. 154 (26 September 2006); *Gomes Lund et al (Araguaia Guerrilla) v. Brazil*. Preliminary Objections. Merits, Reparations, and Costs. Series C No. 219 (24 November 2010).

for which, in light of International Law, they have been declared to have no legal effect.

The position of the Court on this matter is ultimately difficult to accept for several reasons, some of which will be examined in my argument. For the moment, I would like to draw attention to only one, one based on the following consideration. Latin American has a long history of amnesty and pardon laws, a tradition that grew especially dense and populated in recent decades for well-known reasons: on one hand, because of the serious wave of breakdowns in democracy and the massive human rights violations that resulted from them, especially from the 1970s on; and, on the other hand, because of the political and economic inequality that has affected the region throughout modern history, inequality that is also manifested by the presence of a small number of actors who possess enormous influence over democratically-chosen political authorities.

Now, for a variety of reasons (those, for instance, related to the mutual learning that occurred between the different countries in the region in this period, to the fears or enthusiasm generated by events in neighboring countries, to the distinct ways the transitions played out in the different countries, or to the greater strength or weakness of certain civil society actors, etc.) the amnesty laws that began to appear in the region were driven by different motives and acquired forms and substance that were also distinct. This is why the decision of the Court to consider equally lacking of legal effect all amnesty laws involving serious human rights violations despite the obvious and relevant differences among them can seem on the surface at the very least unsubtle and upon reflection ultimately unjust.

The potential injustice of the approach comes out even more clearly when an important, differentiating element of the various amnesty laws from that period is taken into account: their differing *democratic legitimacy*. This is the locus of the difficulty I will call the *problem of democratic pedigree*.

I would like to point out the differences that I see with reference to four amnesty laws – four laws that are very distinct from each other, at least as I understand them – that were passed in the last 30 years in the region. I am referring to: (i) the self-amnesty proclaimed by the National Reorganization Process in Argentina before surrendering power; (ii) the self-amnesty proclaimed by the regime of Alberto Fujimori in Peru following the massacre at Barrios Altos; (iii) the pardon laws passed by the democratic government under President Raúl Alfonsín in Argentina putting an end to the trials of persons responsible for the serious human rights violations that took place in Argentina starting in 1976; and (iv) the Expiry Law passed in Uruguay and reaffirmed in two instances by popular vote. Some brief information on each follows for those who are not already familiar them.

- i) The first of the amnesty laws mentioned refers to Law 22934, or the “Self-Amnesty Law,” which was proclaimed by the government of the last dictator in Argentina, General Bignone, on 23 September 1983, a few weeks before the instauration of the new democratic government that would be led by President Raúl Alfonsín. The norm of the law was implemented with the explicit objective of “pacifying the country” and ensuring “social reconciliation,” going so far as pardoning both the people directly responsible for and anyone who had collaborated with those individuals in any “subversive or anti-subversive” acts committed between May 1973 and June 1982. The conditions under which this

amnesty law was promulgated were of course characterized by maximal restrictions on political and civil liberties and the absence of institutions that might express or be held accountable to the will of the people.⁵

- ii) The second amnesty law that I will reference was proposed by President Alberto Fujimori a short time after the massacre of Barrios Altos, a slum in Peru, which took place on 3 November 1991. The massacre had been carried out by a vigilante group with close ties to the government looking for members of the terrorist group Shining Path, and had provoked such great social upheaval that political and judicial investigations were initiated to identify those responsible for the massacre. Congress, however, prevented the investigations from going forward by passing Law 26479 on 14 June 1995, which declared a blanket amnesty for everyone involved in the act, and which reached back in time to include any human rights violation committed since May 1980.⁶ Two other factors surrounding this amnesty law warrant attention. To begin with, the legislative vote passing the law was taken after Fujimori had dismissed the Congress and managed to consolidate effective control over the entire political system and to severely restrict the forms of democratic debate through actions that targeted the press and any political or labor organization that might have

⁵ With regards this point, I could cite another case and another condemnation decision handed down by the IACTHR, but in this case against Brazil in the context of the “Guerilla of Araguaia” [orig. in Portuguese: *Guerilha do Araguaia*] that was decided in December 2010 in *Gomes Lund v. Brazil*, accessible at http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf. In the case, the amnesty law passed in Brazil, Law number 6.683/79, was analyzed in light of the complaint filed by the Inter-American Commission on Human Rights holding the State “responsible for the arbitrary detention, torture, and forced disappearance of 70 people who were members of the Communist Party of Brazil or local peasants [...] resulting from operations undertaken by the Brazilian Army between 1972 and 1975 with the goal of eradicating the Araguaia guerilla during the military dictatorship in Brazil (1964 – 1985).” Inter-American Commission on Human Rights Report #91/08.

⁶ <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/26492.pdf>.

challenged his authority. In addition, it should be noted that, following Fujimori's fall from power, the investigation into the massacre was reopened and was eventually brought before the Inter-American Court, which, in the already mentioned *Barrio Altos* decision handed down on 14 March 2001, held that this type of amnesty law was invalid.

- iii) The third amnesty law I have in mind actually involves a series of decisions taken by the government of Raúl Alfonsín in Argentina, who was concerned with developments surrounding the historic trial of the military juntas that he himself had initiated. The first indication of the coming pardon laws came in April 1986, when the Minister of the Interior sent out a series of "instructions" to prosecutors ordering them to concentrate their activities on high military officers rather than younger members of the official ranks. Still more pertinently, Law 23492 – known in English as the "Full Stop Law" (in Spanish, the *Ley de punto final*) – was passed in December 1986, setting a term of expiration for penal prosecution of persons not formally accused of forced disappearance of persons within 60 days (this two years after the first trials had begun). The law, which sought to put a "full stop" to the process of churning over the past, in fact only accelerated the number of new cases filed in courts, and thus counteracted its original purpose. For this reason, it was followed by another norm, introduced by Law 23521, or the "Law of Due Obedience" (orig. *Ley de obediencia debida*), passed on 4 June 1987. That law established the presumption of *iuris et de iure* (that is, evidence of the contrary was not admitted) with regards crimes committed during the reign of the military

regime, inasmuch as those crimes were to have been carried out on command of higher military officers. It is important to keep in mind, however, that the norm was implemented shortly after a serious rebellion by young officers during Easter Week in 1987 (Nino 1996). Both laws – Full Stop and Due Obedience – would in the end be ruled invalid years later by the Supreme Court of Argentina itself, which although it nullified them in the *Simon* case⁷ had also – years earlier – maintained their validity in the *Camps* decision.⁸

- iv) The last amnesty law that I would like to reference is the Uruguayan Expiry Law, the principal object of study in this piece.⁹ With regards this law, I would like to first point out that it was passed by the Uruguayan Parliament on 22 December 1986 and that the Uruguayan Supreme Court of Justice upheld its constitutionality in 1988. Later on, as has already been alluded, the law was subjected to popular scrutiny on two separate occasions.¹⁰ The first occasion involved a referendum organized by the National Commission for Referendums that was created in 1987. The vote on a proposal to repeal the first four articles of the Expiry Law took place in April 1989. The law, however, was upheld by 58% of the votes. Years later, when *Frente Amplio* was in power (“Wide Front”

⁷ *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.* (Poblete), Case # 17.768 (14 May 2006).

⁸ Lawsuit initiated following executive decree 280/84; *Camps, Ramón Juan Alberto y otros*, 547. XXI. Fallos: 310:1162 (22 June 1987).

⁹ The Expiry Law of 1986 actually replaced another law passed in 1985 after Commander Hugo Medina, acting as a spokesman for his military outfit, let it be known that they would resist giving testimony of past deeds in judicial hearings (Errandonea 2008, 19).

¹⁰ The most critical point of the Expiry Law is located in the third of its four articles, where it is established that the courts must consult the executive – before opening an investigation – to learn whether the accused is covered or not by the terms of the amnesty. If the executive responds in the negative (that is, if the executive understands that the person under investigation has been given amnesty), then the case is closed (*ibid.*, 22).

in English – a coalition that had not included any proposal to repeal or annul the law in its electoral platform), 340,000 signatures were collected calling for a plebiscite (which requires 260,000 signatures) on the contested norm. The plebiscite was eventually held on 25 October 2009. The proposal was to annul and declare the first four articles of Law 15848 inexistent. Only 48% of the votes tallied were in favor of the proposal, so the law remained in force.¹¹

With these four amnesty laws in mind, it is possible to draw attention to the substantive differences between their normative strategies of pardon. We can clearly identify differences of *degree* among them in terms of democratic legitimacy.¹²

On the basis, then, of the brief historical account advanced above, we can qualify the first norm (i) described, that which was decreed by General Bignone and involved an amnesty law imposed by a blood-soaked military regime in its own favor at its lowest level of popularity as one characterized by an *extreme lack of legitimacy*.

In the second place we have (ii) a norm advanced by the Peruvian President Fujimori and approved in 1995 by the (so-called) new Democratic Constituent Congress, which was put in place after the Congress was dissolved following the (self) coup d'état of 5 April 1992 carried out by President Fujimori himself (before the new members of Peru's sole

¹¹ In October 2011, after numerous attempts to “perforate” the law in order to empty it of content without annulling it, and following an arduous legislative process, the Congress of Uruguay approved Law 18831 for the “reestablishment of crimes of State terrorism committed before 1 March 1985,” which had the effect in practice of eliminating the provisions of the Expiry Law from the legal ordering of Uruguay.

¹² Here I associate the (democratic) legitimacy of a norm simply with the degree of inclusivity and public debate that has characterized it up to the moment of its implementation. In accordance with this criterion, a norm that is promulgated under a dictatorship is typically assigned the lowest degree of legitimacy, due to the high level of social exclusion that surround the formulation and discussion of norms in that environment (where democratic institutions are closed, fundamental civil and political freedoms are restricted, etc.). Regarding the legal validity and the different levels of democratic legitimacy of a decision, see Nino (1987). See also Ackerman (1993).

legislative chamber could take office). The norm was imposed against a backdrop of severe restrictions on civil and political rights so, given these factors, we can maintain that the law warrants a very low presumption of validity or *very low democratic legitimacy*, which for our purposes is the same thing.

Next we have (iii) the pardon laws proposed by the democratic government of Raúl Alfonsín, approved by the national Congress, and supported by the Supreme Court. So, while it is always difficult to measure the legitimacy of a norm, it can be said that Alfonsín's pardon laws were produced in a context of broad civil and political liberties with a mobilized citizenry marching freely in the streets, and in which public debate and disagreement was widespread. These factors, however, must not prevent us from recognizing that these norms were also proposed in response to unjustifiable pressure from military groups that culminated in the very intimidating Easter rebellion. Considering all these aspects, we can say that in this case we are dealing with norms in principle democratically legitimate yet tarnished by illegitimate pressure from military forces.¹³

Lastly we have (iv) the case of Uruguay, in which we once again face an amnesty norm dictated within the context of full civil and political liberty, albeit affected both by reasonable fears (ones commonly found in any democracy) generated by events in neighboring Argentina and by the pressure (in many cases unacceptable) exerted by the Uruguayan military (although not in the form of attempted coups, as was the case of

¹³ This position brings us close to what Argentine Supreme Court Justice Carlos Fayt maintained in his separate opinion in *Simón* when – distinguishing himself from his colleagues on the Court Zaffaroni and Petracchi – he affirmed that he could not consider *Barrio Altos* as a binding precedent since the amnesty law passed in Peru was incomparable to what had occurred in Argentina, seeing as the latter was the result of a democratic congress. In any case, the position that I defend here is distinct from that of Zayt in that it considers, contrary to Zayt, that the legitimacy of the Argentine norms were affected by serious pressure exerted by the military at the time of their passing.

Argentina).¹⁴ The legitimacy of the norm in question, moreover, is notably reinforced for having been twice approved by popular vote, which is understood to be the highest expression of popular sovereignty. In this case, then, we can speak of a norm that is *democratically legitimate to a significant degree*.¹⁵

The differences that separate, for instance, the self-amnesty of the Argentine military dictatorship and the Uruguayan Expiry Law are, everything considered, enormous and warrant at the very least careful and disciplined study. As Carlos Nino would argue in his lifetime, there were no considerable reasons to consider the self-amnesty valid once the Argentine Congress (to some degree in response to his calls) had repealed it (Nino 1996). It should be clear, however, that the case of the Expiry Law represented a case completely distinct from the military self-amnesty in Argentina – a case which involved a complex, troubled, conflictive and yet still deliberative process of collective reflection.

The IACtHR should have made a special argumentative effort in its decision to draw distinctions between some amnesty laws and others. It should have done so not merely for the sake of academic or theoretical pretensions, but rather out of respect for the significance of what it means for the citizenry to reach that level of democratic agreement. If a norm

¹⁴ Arguments against the democratic strength of such popular expressions in Uruguay are commonly found (even in *Nibia Sabalsagaray* itself, in the references to the “strength,” meaning the weight, which the military exerted over democratic processes). This line of argument, however, runs into a serious contradiction in the 1980 plebiscite, which was convoked by the civil-military government itself with the goal of legitimating its continuance and definitively abandoning the democratic Constitution of 1967. In fact, against all expectations, the citizenry of Uruguay – *during the dictatorship* – did not hesitate to reject, by more than 57% of the vote, the invitation formulated by the military government. In other words, even in the worst conditions, the Uruguayan citizenry proved itself capable of standing up to the dictatorship by popular vote.

¹⁵ It is very important to emphasize, however, that the analysis warranted by circumstances surrounding any given public decision, in terms of democratic pedigree, does not end with nor necessarily finds its most interesting aspect in the exercise of popular vote. Maintaining the search for the particular characteristics of the plebiscite remains relevant: who convoked it; how the issues of the matter were framed; what levels of information and discussion were involved; etc. I am thankful to Gustavo Beade for his comments in this regard.

enjoys (a certain degree of) democratic legitimacy, it follows that it cannot be simply defied as if it had been imposed by a dictatorship. *In other words, there exists a serious problem when, for instance, norms that are illegitimate in an extreme sense are considered identical to norms that are democratically legitimate to a significant degree.*

In addition, in the case that concerns us most, that of Uruguay, it is interesting to note that exalted leaders and jurists linked to the *Frente Amplio* government actually recognized the significance of the repeated majoritarian pronouncements in favor of the pardoning norm. What makes this interesting is that many of these same individuals were convinced that prosecuting all people responsible for massive crimes was imperative and, accordingly, militated for that cause.

The constitutional scholar José Kosterniak, for example, a professor of constitutional law and socialist legislator in *Frente Amplio*, fought against the Expiry Law for years. Nonetheless, he would eventually proclaim (“even though it pains me and goes against my emotions”) that the opinion of the citizenry had to be respected because the electoral corps represented an organ that was higher in the hierarchy of the State than the three branches of government.¹⁶ Similarly, the historical *Frente Amplia* senator Eleuterio Fernández Huidobro (one of the principal authorities and ideological minds behind *Frente Amplia*) maintained that “no subterfuge could elude the two gigantic mountains that represented the two electoral consultations of the highest organ of sovereignty imaginable in Uruguay.”¹⁷ Likewise, the secretary of President Alberto Breccia admitted that, although “the goal to eliminate the Expiry Law is very important,” it was not so important as to justify that “we

¹⁶ *La República*, Uruguay, 20 March 2010.

¹⁷ <http://www.180.com.uy/articulo/14697>

ourselves infringe our constitutional ordering in order to eliminate it, or even, perhaps, so important as to consider ignoring two popular votes.”¹⁸

Contrary to such statements, the approach adopted by the IACtHR in *Gelman* belied a schematic structure lacking any nuance. For the Court, amnesty laws were simply prohibited in all cases. The judges on the Court made it clear that the incompatibility with the Convention on Human Rights was not limited to “self-amnesty laws” but instead applied to every type of amnesty law because the relevant factor was not “the process of adoption” of the norm or “the authority that issued the amnesty law,” but rather “its *ratio legis*,” that is, “leaving unpunished serious violations of international law” (paragraph 229). Graver yet, and were the previous argument not sufficiently clear, the Court then points out the fact that “the Expiry Law’s having been passed by a democratic regime and even ratified or supported by the citizenry on two occasions does not automatically or in itself grant it legitimacy as regards international law.” For the Court, the incompatibility of amnesty laws with the American Convention “does not derive from formal considerations, such as their origin,” but rather from their substantive aspect. In other words, both the expression of a sovereign Congress and the organization by the citizenry of, first, a referendum and, secondly, a plebiscite, represent merely *formal* matters that have little to do with the substantive validity of a law.¹⁹

¹⁸ *El Espectador*, Uruguay, 18 November 2010.

¹⁹ Herein arises an objection that my colleague Victor Abramovich, who served as Vice-President of the Inter-American Commission of Human Rights, has often brought up – for which reason I refer to it as the “Abramovich objection.” The Abramovich objection starts with the idea that the countries of the region also “democratically” affirmed their participation in the Inter-American justice system and “democratically” become parties to the human rights treaties that the courts – whose authority has thus been “democratically” recognized – are now obliging those countries to respect. In other words, the objection draws attention to the *democratic pedigree* of the decisions to which I object using arguments of the same caliber. The objection, however, does not strike me at all as convincing. This is so (besides once again using a “flat,” undifferentiated conception of democracy) for the following reason: Ever since the

In short, in fewer than ten lines, and basically without offering any argument, the IACtHR in *Gelman* overruled without any extenuating or mitigating considerations a decision of the Uruguayan Congress that had been ratified by the popular opinion of more than 50% of the population expressed through clean and direct means. What we would call the *problem of democratic pedigree* was thus clearly laid out in its most serious form.

II. Rights: The Problem of Disagreement and Distrust of Majorities

Much of what the IACtHR said and did not say in *Gelman* with regards democracy may be better understood after identifying the premises of its references to the idea of rights. Although the opinion in *Gelman* is sufficiently explicit in this sense, the case has a fundamental precedent that reveals, even better than the decision in question, the conception that then became so relevant in the understanding of democracy and rights.

The precedent to which I refer is the Uruguayan Supreme Court of Justice case *Nibia Sabalsagaray Curutchet*, the case of an activist who was tortured and killed by agents of the military regime in 1974. In deciding the case, the Court unanimously declared the Expiry Law to be unconstitutional, alleging that it violated the principle of separation of powers and that it could not be considered an amnesty law.²⁰ It was directly and explicitly

first public considerations in our knowledge regarding judicial control – I am thinking of, in particular, the juridical-political battle waged in the context of *Marbury v. Madison* in the United States – it has been clear that the creation and acceptance of an organ possessing jurisdictional authority does not close, but rather opens, the debate regarding the reach, limits, and modalities of that organ's conduct. That is to say that the act of setting up and putting into operation a high court does not preclude debate over what that court can decide or the modalities and authority of those decisions, but rather inaugurates it. And, as we are lamentably aware, after more than 200 years of reflection on the matter, the question of the (democratic) legitimacy and reach of the authority of high courts remains to be settled.

²⁰ *Sabalsagaray Curutchet, Blaca Stela*. Complaint. Unconstitutionality Objections for Articles 1, 3, and 4 of Law No. 15.848, Ficha 97-397/2004.

taken into account by the IACtHR as a precedent on which its own decision in *Gelman* was based.

In *Nibia Sabalsagaray*, the Uruguayan Court advanced a peculiar theoretical position as the basis of its decision. At its center, the Court (i) drew a strict separation between the realm of democracy and that of rights, (ii) maintained that any democratic interference in the realm of rights should, in principle, be considered invalid, and (iii) affirmed that exclusive competence for carrying out this invalidation process fell to the judiciary.

Closely following the ideas of the Italian legal philosopher Luigi Ferrajoli (a permanent authority of reference for Latin American jurisprudence in matters of criminal punishment), the Uruguayan Court held that everything concerning rights was contained within a *non-decidable sphere* (as Ferrajoli called it).

As Luigi Ferrajoli maintains, the constitutional norms that establish the basic principles and rights are the guarantors of the material dimension of ‘substantial democracy’ which refers to questions which cannot be decided or that must be decided by the majority ... under penalty of invalidity (*Nibia Sabalsagaray Curutchet*, p. 30).

Further on, directly citing the Italian author (to be specific, his work *Democracy and Guaranteeism*), the Court held that:

[...] matters pertain to what I have called the ‘sphere of the decidable,’ basic rights are removed from the sphere of political decision and belong to what I have called the ‘sphere of the non-decidable’ ... Whenever a right is recognized as fundamental, it is removed from the political sphere, that is, from the control of the majority ... as an inviolable, obligatory, and unalienable right. No majority, be it unanimous, can decide its abolishment or reduction (*ibid.*, p. 32).

As the Uruguayan Court itself admits in its argument, the idea of the *non-decidable sphere* to which it subscribes runs parallel to what the Argentine philosopher Ernesto Garzón

Valdés defined as *reserved domain*, or what the Italian Norberto Bobbio would describe as *inviolable territory*. The resulting idea, then, was that for every case (and here I again cite the Uruguayan Court) “no majority attained in the Parliament or ratification by the electorate – be it unanimous – can impede the Supreme Court of Justice from declaring a law [that violates rights] unconstitutional” (ibid. p. 31).

The Uruguayan Court was also emphatic on this point of the modalities and reach of the power of the judiciary. Here it held that “the analysis of applicability of a legal norm to a concrete case in terms of its compatibility or reconciliation with the dispositions and principles of the Charter is exclusively reserved to the Judiciary, represented by the highest organ its hierarchy” (ibid., p. 34).

The IACtHR seems to directly follow the Uruguayan Court’s decision in this respect. In paragraph 239, which cites the *Nibia Sabalsagaray Curutchet* decision, it holds that “the protection of human rights constitutes an unbreachable limit for majority rule; that is, one beyond the sphere of what is ‘subject to decision’ by a majority vote in democratic motions.” The IACtHR, hence, not only embraces the argument of the Uruguayan high court but also, by extension, the conclusions of Luigi Ferrajoli. Diego García Sayán, in his quality as President of the IACtHR, recently reaffirmed this position, with reference to the very same passage, adding that “the limit on the decision-making power of majorities is, then, respect for individual rights. And that is because this limit was decided by the sovereign powers of the state in becoming party to international human rights treaties.”²¹

The forcefulness of all these affirmations, however, masks the problem of what we will call the problem of disagreement, a difficulty that stems from the fact that we have (and will always have) radical yet reasonable disagreements about the rights we wish to protect.

²¹ <http://www.larepublica.pe/columnistas/atando-cabos/en-nombre-de-las-mayorias-28-06-2012>

It would naturally be reassuring to be able to agree upon one definitive selection among all possible combinations of rights that could immediately be consecrated through inclusion in the constitution or a human rights convention in a way that would render them unwaivable, unconditional, and inviolable by any majority decision (even from unanimous decisions, the IACtHR would argue). Withal, in reality we disagree – reasonably – over what those rights should be, and what their content and contours are. This essentially involves what the jurist Jeremy Waldron defined as the *fact of disagreement*: our life in society is decisively marked by reasonable and persistent differences of opinion with regards justice and rights (Waldron 1999). Following Waldron, we might also add an observation that is particularly pertinent to our context, and that is that, in the face of such deep disagreements, we are really left with very few alternatives that allow us to continue cooperation other than to carry on the debate until, eventually, some decision-making procedure based on majority rule is adopted.

This does not mean that the idea of rights is renounced; nor does it imply simply collapsing rights under the idea of democracy. What this implies, rather, is that the opposite strategy is objectionable, that is, it contests the wisdom of the strategy that simply treats the idea of rights as isolated from or lacking any contact whatsoever with the notion of majority rule. On this point and again echoing Waldron, it might be useful to point out that the pretension of completely separating the discussion of rights from the mechanism of majority rule presents immediate problems. These problems can be clearly seen in almost any decision of courts, the IACtHR included. Two important qualities for my argument stand out in these decisions: firstly, the court opinions attest to the existence of reasonable internal disagreement (among the judges, in this case); and in the second place, and because of the

demonstrated internal disagreement, these courts rely on majority rule (again, among the judges in this case) as the means of settling their disagreements.

If the Uruguayan Court or the IACtHR refuse to take this step, it is due to two additional assumptions (which are as difficult to sustain as the one that ignores the fact of disagreement) that seem present in their reasoning. The first of these assumptions associates majority rule with a tendency to make irrational or unreasoned decisions while the second, which represents the flipside of the first assumption, associates the judicial branch with rational and reasoned decisions.

Both assumptions, moreover, systematically arise throughout the work of Ferrajoli, who represents the decisive theoretical reference on the issues that interest us for the courts in question. In Ferrajoli's opinion, to be specific, firm judicial safeguard of rights becomes necessary in light of "the majoritarian and often plebiscitary degeneracy of representative democracy and its videocratic perversions; or, summed up in one word, against the *kakistocracy* that Michelangelo Bovero discusses" (Ferrajoli 2008, 85). Graver yet, according to the Italian author, this inherent degeneracy of majority rule does not represent an imaginable if undesirable possibility, but rather an inevitable tendency of democracy in certain conditions (which are all too common). In his opinion, the (as he calls it) *kakistocracy*, or government by the worst, is related to the "(inevitable) degeneracy, outside the presence of adequate limits and controls, of political democracy" (ibid., 88). Ferrajoli wonders, then, if "the constant worsening of the 'government by the worst' that we are observing in so many of our nations (is) not a perverse effect characteristic of the deterioration in the common sense ... of the value of the constitution and the guarantees that it imposes on the democratic powers of the majority" (ibid., 88). It is precisely from

theses suppositions and beliefs that Ferrajoli derives the necessity of adopting “countermajoritarian” barriers and controls against democratic power.²²

Without doubt, this type of supposition regarding the inherent irrationality of majorities and the (consequent) necessity of judicial control appear to be what has made it possible for courts such as the ones cited to affirm, with the conviction that they have demonstrated, that the issue of rights must belong to the *exclusive* competency of the Judiciary; the courts either consider basically irrelevant the fact that an amnesty law was “approved in a democratic regime and further ratified or supported by the citizenry on two occasions; or they qualify, first, the decision of the Uruguayan Congress, then the referendum, and later on the plebiscite, as merely “formal” expressions completely lacking importance when evaluating the validity of the law.

An excellent example of how the *problem of disagreement* over the contents of rights affects the decision-making practices of the courts arises exactly in the *Gelman* case that we are considering. The example that I have in mind does not concern a marginal aspect of the decision but rather one that is located, more accurately, in its very center. I am thinking of one of the central reasons that the IACtHR puts forward to justify its decision to consider the Expiry Law contrary to the terms of the American Convention on Human Rights. If in its decision the Court condemned Uruguay of violating the Convention by

²² The author says: “We are well aware that, were the people unanimous, this would be the most eloquent sign of the totalitarian degeneration of democracy, and that speaking of the “power of the people” is used to cover over the political pluralism and the conflicts that cut across societies... And it is precisely to prevent this power from becoming absolute that political democracy, to avoid contradicting itself, must incorporate ‘counter-powers’ against all, even those in the minority, designed to limit the powers of the majority. It is not clear why these counter-powers should not also be construed as “powers of the people” (or ‘democratic powers’) because in fact they make up the fundamental rights, by virtue of which each and every person is guarded against the aggression and whims of one part of society against the others” (ibid., 87).

enacting the Expiry Law, this is because the States – the Court holds – are obligated to “penalize” persons responsible for serious crimes. This obligation emanates, according to the clarification of the IACtHR, from “the obligation of guarantee exalted in Article 1.1 of the American Convention” (*Gelman*, paragraph 189). That Article – the Court adds – obliges States to “avert, investigate, and penalize any violation of the rights recognized by the Convention and, moreover, to seek the reestablishment, if possible, of the infringed right and, depending on the case, reparation for damages incurred by the violation of human rights” (*ibid.*, paragraph 190).

Yet when one reads Article 1.1 of the American Convention, one does not find any iron-clad, detailed series of obligations as enunciated by the IACtHR. Article 1.1 of the Convention reads as follows:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

In sum, one of the principle reasons advanced by the IACtHR for condemning Uruguay for its failure to respect the International Human Rights Law in force has to do with an Article of the Convention that nowhere makes any more or less explicit reference to obligations to “avert,” “investigate,” “penalize,” reestablish and “make reparations” for “damages incurred by the violation of human rights” – obligations that, according to the IACtHR, Uruguay did not meet. These obligations derive from a juridical interpretation made by the court that is, at the very least, very controversial (and that, furthermore, contradicts the democratic expressions of the Uruguayan Congress and citizenry). This example, then,

clearly represents the significance and implications of failing to take into account the *problem of disagreement* when reflecting on the sense, meaning, and reach of rights.

III. Punishment: The Problem of Diverse Forms of State Reproach

At the end of the previous section we examined how the IACtHR condemned Uruguay for, among other reasons, not “investigating and penalizing” the serious violations of human rights that had occurred in the country. We were able to identify problems regarding the Court’s reading of Article 1.1 of the American Convention, the Article the Court invoked as the grounds for Uruguay’s obligation to avert, penalize, and seek reparations for damages incurred through those human rights violations.

The problems that arose then were of a different type. At the end of the previous section, we focused on one of those problems – a particularly serious one – whose root lay in the inherent difficulty of juridical interpretation. There we observed that the interpretation made by the IACtHR of the cited article was not obvious at all and that Uruguay was nonetheless, on the basis of the interpretation, obliged to reproach past behavior by investigating and penalizing the people responsible for serious rights violations.

In the section ahead, notwithstanding, I will dedicate attention to a different problem, albeit one intimately linked to the one just discussed, one that involves the different means by which a democratic community can react to crimes.

According to the IACtHR, “The way that the Expiry Law was interpreted and applied, at least for a while, in Uruguay had an effect upon the international obligation of the State to

investigate and penalize serious human rights violations [that occurred in the country]” (*Gelman*, paragraph 230). And again:

The lack of investigations into the serious human rights violations ... appearing in systematic patterns, belies a failure of the State to respect its international obligations, which are established by international norms. Given its manifest incompatibility with the American Convention, the dispositions of the Expiry Law that prevent the investigation and penalization of serious human rights violations do not possess any legal effect and, in consequence, can no longer impede the investigation of the facts of the present case or the identification and punishment of the persons responsible (*ibid.*, paragraphs 231, 231).

These declarations by the Court do not only suggest that there exists one sole (and, as we will see, disputable) way to interpret the text of the American Convention regarding the duties of the State to address whenever necessary infringements of human rights. The Court’s statement implies, in addition, that there basically only exists one way for the State to react to such crimes, that being the response of punishment.

Yet the response of punishment does not necessarily follow from the text of the Convention (nor from a more or less literal interpretation of it) and, moreover, such a response is problematic in at least two aspects. The first problem that occurs to me has to do with democratic theory and consists of the observation that a democratic community should have a larger range of action in deciding the manner in which it wants to live, the ways it wants to organize itself, and the ways it wishes to reward or admonish certain behaviors that for given reasons it considers especially relevant. The second problem, which is the one that particularly interests me, has to do with one aspect of the *theory of punishment*, and is related to the fact that penal punishment can be seen as one of the worst imaginable responses in reaction to crimes committed within a democratic community.

While I would like to focus on the theme of punishment in this section, to do so I should clarify two issues already raised. In the first place, the IACtHR insisted that its condemnation of Uruguay was due the country's failure to meet its obligation of "penalizing" and "investigating." Here I want to take up the omission that Uruguay would have committed in penalizing the persons responsible for massive rights violations, but noting in passing that the logical argument starting from the grounds cited in the Court's opinion to what the Court affirms in its conclusion is not clear; that is, that Uruguay had failed to respect, nor was capable of respecting (on the basis of the impunity law overruled) its obligations to *investigate*.²³

In the second place, I would like to make clear that, for the purposes of this paper, I do not need to prove the superiority of the existing alternatives to penal punishment. I need only clearly demonstrate that the IACtHR not only fails to tell us why the Convention requires "penalization," but also that it appears unnecessarily committed to the idea of punishment over other possible alternatives available to any democratic community.

²³ See, for example, the work of the Peace Commission created under President Battle in Resolution 858 of 9 August 2000: http://medios.presidencia.gub.uy/jm_portal/2012/mem_anual/presidencia/paz.pdf. The work was the continuation of another very important report organized by a regional NGO, the Peace and Justice Service (SERPAJ), that was published in December 1989. See also, for instance, the report of the President of the Nation on the Historical Investigation of Disappeared Detainees, available at <http://archivo.presidencia.gub.uy/web/noticias/2007/06/tomo4.pdf>. Likewise, see the declarations of President Tabaré Vázquez with regards the work and research undertaken by the government on the issue (for example: <http://www.sandiegored.com/noticias/8426/Expresidente-uruguayo-critica-un-fallo-de-la-Corte-Interamericana-de-DD-HH/>), and in particular the research promoted by that President in order to fully comply with Article 4 of the amnesty law. In 2007, as a result of such investigations, five volumes were published comprising a Uruguayan version of the "Nunca Mas" report that detailed such crimes in Argentina. Lastly, I would call attention to the policies of memorials and reparations – which while imperfect remain meaningful – that were implemented by the Uruguayan government, which included both the creation of a National Memories Archive and a museum and library dedicated to the same end (as well as creating monuments and marking locations with commemorative plaques) and retirement benefits for exiles returning to the country and compensation for former political prisoners (Errandonea 2008, starting at p. 46).

Moving then to how the IACtHR dealt with the issue of punishment in *Gelman*, we reencounter the difficulty that I have previously called the *problem of diverse forms of state reproach*. As might be expected, the problem in question arises from the failure to recognize that a democratic State has, and must have, the possibility of choosing the manner in which it reproaches given behaviors; and that the form chosen may include, or not, the modality of punishment with which we are familiar and that we currently practice.

This implies recognizing, first of all, that there is a difference between reproach, penalization, and punishment that warrants more careful analysis and exploration (Gargarella 2008). Such an analysis is preferable to simply collapsing all of these categories into the worst version of one of them: the deprivation of freedom. This is why I endorse, for instance, the observations of Leonardo Filippini – who in light of *Gelman* has addressed the same question – when he reminds us that “legal discourse – that of the IACtHR being no exception – continues to assimilate ... the concepts of reproach, penalization, and punishment, which to a large degree naturalizes the association of prison with the expression *par excellence* of social disapproval” (Filippini 2012, 190).

It is worrisome that the IACtHR should commit itself to its idea of punishment the way that it did, not only because its argument was based on authoritative references that, in truth, do not provide the necessary support for the conclusions the Court reaches, but also because the response that it required did not represent the only one available, and moreover represented one that was much too unattractive to be accepted without question or criticism.

If only to provide some bases for the statement that, in declaring itself in favor of punishment, the IACtHR made a particularly unattractive choice, I might list arguments such as the following, arguments that address the question of punishment as appropriate state response, either in particular to serious human rights violations or more generally to those violations in addition to other infractions of the law:

- i) One of the most important objectives after a period of serious rights violations is ascertaining “the truth behind what happened,” and this objective tends to conflict with the most punitive responses, which tend to cause those responsible for violations to become entrenched in silence (through “blood pact” strategies), thus making “truth” the exception rather than the rule in the process. In general, it could be said, there seems to exist strong tension between the structure of criminal procedure and the “truth-seeking” intention (Pastor, 2004, 2005, 2009).²⁴
- ii) In retributive terms, as we have observed, there are different ways to reproach someone for offenses committed that do not implicitly impose a commitment on the State to carry out a task that is difficult to justify: that of administering punishment, punishment understood as the “deliberate imposition of pain” (as defined by Hart 1968).
- iii) In consequentialist terms, if the intention is preventing other groups (in our case, typically military ones) from engaging in future violent actions, there are

²⁴ In Pastor (2009), the Argentine professor lists a series of reasons supporting the argument that it is a mistake to choose “the broken criminal procedure to guarantee the right of victims referred to as the right to truth” (ibid., starting at p. 50). The list includes reference to teleological, epistemological, methodological, technical, political and historical reasons.

a multiplicity of imaginable measures that might help us attain those goals other than punishment (including, in this case, restrictions imposed by the richest countries on the “expected rewards” of those who carry out coups – along the lines of the argument explored by Thomas Pogge (2002).

- iv) With regards “special negative prevention,” if the intention is to prevent people personally involved in a violent coup from taking part in another one, the possible avenues to achieve that objective are also all too diverse, and moreover not necessarily associated with (nor apparently dependent on) punishment. Recent Latin American history, for instance, seems to demonstrate this: after a century characterized by one military overthrow after another, at least three decades then went by without any new coups d’état (using a narrow definition of coup). This identical result was produced in countries with very different histories in terms of the responses of the new democratic regimes that took over from military regimes (some countries, such as Argentina, started with criminal trials and sentences; others, such as Brazil, passed amnesty laws; still other countries, such as Chile, only began to open investigations much later– forced in principle by international pressure –into what had happened years earlier; etc.).
- v) The response of depriving freedom or prison confinement, given the conditions under which it is administered today in Latin America (conditions which are consistent with those under which this form of punishment has been administered in the region throughout its history), often very closely approaches forms of torture, which in all circumstances should be considered unacceptable.

- vi) The idea of completely “separating” one group of people from the rest of society and from their loved ones (while “binding” them to people who have been identified as those who present the most serious difficulties of social integration) seems to conflict sharply with the objective of “reintegrating” them into society, even though the latter is habitually alleged in justifying their isolation.
- vii) Prison (beyond its habitual description as a “school for criminals,” Braithwaite 1999, 1738), tends to generate resentment in the people who are confined.²⁵
- viii) Incarceration, as it is currently conceived and practiced, is far from an adequate response in terms of treating guilty parties as equals in terms of moral agency; that is, as people who are capable of reasoning, of comprehending the charges laid against them, and, just possibly, of truly repenting and seeking pardon for the offenses committed – premises which, to my understanding, should be evident in any sensible, humane state response, even when or especially in extreme cases such as those currently under examination (Duff 1986, 1998, 2001, 2004).

As might be expected, a list such as the one above does not at all aim to “prove” that penal punishment is the worst option at our disposal in responding to massive crimes. The intention, rather, is simply to affirm that this option is not easily justifiable and that it is even more difficult to justify when considering some of the alternatives that appear to be

²⁵These negative and inefficient effects seem to be backed up by consistent findings from psychological research that illustrate the effects of *challenge* and *reaction* that is caused by the use of force against persons deprived of their liberty (Braithwaite & Pettit 2000, 154; Braithwaite 1997).

as good as or even more reasonable than the option of punishment.²⁶ Moreover, it should be emphasized that these alternatives are not unimaginable nor merely theoretical, but instead ones that have been concretely explored in practice – typically in Latin America through truth commissions, for instance, the “Commissions for Truth and Justice” in Chile and El Salvador; the largely imperfect “Justice and Peace Law” in Colombia (Uprimny et al 2006); the Uruguayan “Peace Commission”; or the more recent “Truth Commission” set up by President Dilma Rousseff in Brazil (see, for an overview, Sikkink 2011). Smulovitz (2009), who only examines the case of Argentina, gives an account of the enormous variety of the legal and non-judicial strategies adopted in the country in the attempt to address past injustices during times when the possibility of criminal sanctions were limited. Those alternatives included, for instance: (i) seeking monetary reparations; (ii) appealing to international tribunals; (iii) issuing public apologies from institutions and individuals involved in past repression; (iv) establishing dates for public commemoration; (v) subjecting people to social ostracism; (vi) creating official institutions dedicated to honoring and preserving the historical memory; (vii) creating commemorative monuments, spaces, and dates; and (ix) establishing “truth trials;” etc.

Experiments such as the ones cited above may have turned out more or less successful in terms of their objectives, but that is not what is important for this argument. Instead the

²⁶ With regards the alternatives to punishment, for the moment I will merely make reference to the vast amount of specialized literature on the subject (Braithwaite 1998 y 2000; Braithwaite & Pettit 1990; Braithwaite & Pettit 2000; Cunneen & Hoyle 2010) while citing the compared historical experience, which is also rich. The comparative experience, in fact, allow us to see that other countries have chosen forms of response other than punishment to address massive rights violations (see for example Baraine & Levy 1995). South Africa is the most-cited example in this sense, because of its primary preoccupation with seeking, before penal punishment, the truth of what occurred.

point is to simply make clear that there exist different – and reasonable – ways to respond to the outrage caused by massive crimes.

That, in short, is the problem that I want to emphasize one last time before concluding this section: the problem that derives from the incapacity demonstrated by the IACtHR to handle the issue of *diverse forms of state reproach* – an incapacity that goes hand in hand with the Court’s refusal take seriously the capacity of a democratic community to choose the principles by which its fundamental institutions will be organized.²⁷

Final Comments: Towards an Integrated Theory

In *Gelman*, the IACtHR missed an excellent opportunity to make a contribution to the international collective debate around several issues of first-order importance, such as those related to democracy and the legitimacy of decisions that stem from public debate; those regarding constitutional rights and the inherent complexity of judicial interpretation; and those regarding state punishment and the diversity of ways a community can reproach the behavior that it rejects.

Instead of developing a vision that is in many respects simplistic, overly committed to punitivism, and based on distrust of the citizenry, the IACtHR could have helped us develop a theory much richer in democratic terms; more aware of the inherent complexities of legal interpretation; less committed to punitive approaches; and, lastly, capable of

²⁷ There do exist reasons for equal treatment, however, that may sensibly move us to consider that it would not be fair for the authority holding coercive power to grant “special” treatment precisely to those individuals responsible for the worst crimes committed in the history of the region. Personally speaking, I agree with this argument, although that does not lead me to believe that such reasons for equal treatment ultimately demonstrate the necessity of generalizing the response of irrational punishment that, in my opinion, currently is applied to the rest of the prison population all over the region.

incorporating our intuitions regarding democracy, rights, and punishment in an inclusive theory.

Of course, working out all the details of such an integrated theory would be no easy task, nor one that would be taken up in the context in question. Still, I believe that the criticism I have leveled at the decision of the IACtHR in *Gelman* provides some indication of the contours of an integrated theory distinguishable from the vision outlined by the Court.

Such a theory could start with the elemental idea that every community has the right to self-determination and the right to define the fundamental principles by which its basic institutions will be organized. This idea arises from the assumption that, within each given community, no authority is greater than the deliberated will of its own members.

The capacity of the community to make decisions on its own matters should include the possibility of selecting a certain number of fundamental interests, for the purposes of entrenching or protecting them by some special means – typically by assigning them the status of basic rights. At the same time, discussion regarding these rights should not be considered closed after they are initially recognized. Matters as important as these warrant ongoing discussion, rather than a single definitive decision. What is needed is collective reflection persistently carried out with the aim of refining and more precisely identifying the interests that the community wishes to protect, as well as the specific contents of those interests and their exact contours. This requires of us a process of collective, open, and never-ending dialog.

This turns out to be consistent with the idea (outlined above) according to which not all processes of collective decision-making or reflection are equal or equally trustworthy. We

are familiar with processes of preference aggregation that leave to one side all effective opportunity for deliberation (Elster & Hylland 1992). Similarly, we know that the processes meant to respond to demands for public deliberation are often co-opted by groups only acting out of self-interest; or that the deliberation over a concrete case might neglect all prior processes of information-gathering; or that it might exclude a majority of those “potentially affected” by the eventual decision (Habermas 1998). Restrictions such as these might result in decisions that are more biased, less considerate of the interests of everyone, and less impartial (Nino 1991). Conversely, it can be said that the more informed, transparent, and inclusive the deliberative process is, the less likely it is that decisions will be taken that favor a handful of people, and the more likely it is that the chances of logical or informational errors in our decision-making will be reduced, errors that otherwise would be much more influential. These last hypotheses help us formulate a conception of democracy based on inclusive deliberation (along the lines of the ideals of deliberative democracy, Elster 1998, Habermas 1998, Nino 1991) that seems quite different from the conception assumed by the IACtHR in *Gelman*.

Democratic deliberation – I would add – should not be limited, at least with regards issues of intersubjective or public morality (Nino 1991). Democratic deliberation should also – if not especially – be applied to subjects such as the modalities of state reproach and punishment. This in spite of what a theory such as that of Ferrajoli might suggest in this respect, which would see such decisions as trending towards irrational, and see the effects on penal matters as far too punitive in nature (Ferrajoli 2008). I understand, of course, that my suggestion in this regard – one that seeks to bring criminal law back into public debate – might provoke justified fears and resistance. In any case, however, such doubts should

be analyzed in light of the penal policies that have been developed in our countries in recent decades. These policies have, to my understanding, endlessly oscillated between welfarist and populist agendas that were in every case formulated by small elites (Garland 2002). It can hence be said that the essence of the criminal law of these last decades was created, applied, and interpreted by elites, and the results – criminalizing, elitist, classist, racist, cruel – do not only fail to offer any reason for enthusiasm, but moreover confirm the problems that can be expected of law that is completely captured and designed by legal elites.

The ties between democracy and punishment are, of course, not simple; rather the complete opposite is the case: it is possible that, by appropriate democratic means, decisions might be taken that contradict some of the traits that should characterize, according to the perspective I have adopted in this paper, state reproach. As regards this matter and for the time being, I will only make a few affirmations. First, I would say that the posture that I am defending is based on trust, rather than on distrust, in the discussion that underlies the formation of majorities generated following a number of given ground rules. I will also stand firm on the idea that there are no reasons to believe that such majoritarian decisions will result in intemperate demands for punishment (along the lines the ones that currently predominate, often as a result of elitist decision-making processes), and that there are not any reasons to believe, contrariwise, that they would end up instituting the forms of state reproach that one individually might consider to be the most appropriate. Along these lines, I would emphasize, secondly, that I would draw distinctions among the different reasons one can cite to defend, in an assembly, a given vision of state reproach and the reasons to which one can point to uphold the results of a collective assembly, to the degree that certain

basic procedural rules have been respected. More specifically, I would reject the idea that a given decision *becomes* a “correct” decision because it is the result of collective deliberation (“ontological populism” in the terminology of Carlos Nino, 1991). Rather I assume that the presence of an inclusive debate that respects certain specific procedural rules offers some reason for believing that in this way we can maximize the chances of achieving impartial results and avoid undue biases. Lastly, I would point out the following: I understand that the reasons one has for defending one democratic procedure over another as based on the same premises that furnish our reasons for defending a given view of state reproach: the consideration other people as equals; the assumption that other people, like oneself, are rational and capable of changing their opinion (as opposed to the idea, for example, that the other must be disciplined by force, following Duff (2001)); and the presumption that the processes used to organize social life should be designed to express our mutual respect, inasmuch as equal subjects in moral dignity.

The position just advanced, strongly anchored in a particular theory of democracy, also turns out to be relevant when reflecting over the role that international human rights courts could have as regards serious rights violations committed inside a defined community. The issues involved are, I repeat, varied and complex, which is why for the moment I will limit myself to a few brief preliminary thoughts.

On this issue, and before going any further, I admit that there are crimes that are offensive to all humanity, regardless of my insistence on the idea that communities, given their diversity, should be given absolute precedence in deciding how they want to address these

crimes, and what response to them they find appropriate (Duff 2008, Renzo 2012, 2012b).²⁸ For the rest, I would add that the vision I propose – which prioritizes “national” or local jurisdiction when tackling such grave matters – does not imply any commitment to a “nationalist” attitude. On the contrary, the notion of *democratic pedigree* discussed earlier suggests that not all the collective expressions that emerge from the heart of a given community merit special deference, solely by virtue of the borders that separate that community from different ones. Accordingly, I would add, decisions taken under (for instance) conditions of high levels of exclusion, insufficient information, limited public debate, restrictions on free speech and dissent, and banned political parties and unions (distinctive characteristics of autocratic regimes) qualify them as decisions of low democratic legitimacy and therefore enjoy a low presumption of validity. In such circumstances (those that, let us say, characterized the self-amnesty law passed by the military regime in Argentina under the dictator General Bignone, and in a certain fashion, the similar conditions present in Peru when Fujimori pushed through that amnesty law), decisions of international organisms gain authority and trustworthiness. That does not occur, however, when the decision under analysis is the product of a complex and difficult, yet transparent, clean, and largely participative process (such as the one that could be found in Uruguay when the Expiry Law was put to plebiscite). Facing these types of decisions,

²⁸ Antony Duff and Massimo Renzo, two theorists of criminal law who have both studied the matter, have arrived at a certain level of convergence despite having approached the subject from different directions. Duff (2008) approaches the topic from a “relational” perspective which leads him to privilege the right of the community itself to call to account any given individual for any serious offenses that person may have committed. Renzo (2012b), however, begins with the idea that violations of basic human rights are the concern of the entire international community, yet concedes that, for reasons both “pragmatic” and “of principle,” national courts should be the ones used to address such crimes. On this point, he maintains that, “while all human beings have the right to call me to account for these crimes, the particular subset of humanity that constitutes my political community has stronger grounds to do so because I am responsible to its members not only as a fellow human being, but also as a fellow citizen” (2012, 472). For more on this subject, see also Chehtman 2010 and Almqvist and Esposito 2012.

international courts should be especially careful, respectful, y deferential – qualities that were anything but distinctive in the decision of the IACtHR in *Gelman*.

Reasons such as the ones laid out in this paper permit us to question the decision taken in *Gelman*. In synthesis, this is because: (i) the Court assumed a vision of democracy that was (not only based on distrust of the citizenry but moreover) “flat,” that is, completely insensitive to relevant nuances as regards the robustness or legitimacy of popular decision-making; (ii) the Court held an inflexible view of rights, one that assumes them to be completely disconnected from democratic discussion (which is consistent with traditional defenses of judicial control and of the subsequent role of international courts in protecting human rights); and lastly (iii) the Court demonstrated, without offering any substantive reasons in its defense, a narrow view of state reproach, one aligned with punishment and, once again, one intentionally shielded against collective debate.

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